HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HAYNE, HEYDON AND CRENNAN JJ

BAIADA POULTRY PTY LTD APPELLANT

AND

THE QUEEN RESPONDENT

Baiada Poultry Pty Ltd v The Queen [2012] HCA 14
30 March 2012
M126/2011

ORDER

1. *Appeal allowed.*

2. *Set aside the order of the Court of Appeal of the Supreme Court of Victoria made on 18 February 2011 and, in its place, order that:*

   (a) leave to appeal to that Court be granted;

   (b) the appeal to that Court be allowed;

   (c) the conviction and sentence of the appellant, Baiada Poultry Pty Ltd, be quashed; and

   (d) a new trial be had.

On appeal from the Supreme Court of Victoria

Representation

P G Priest QC with M J Croucher SC for the appellant (instructed by Norton Rose Australia)

D A Trapnell SC with K Argiropoulos for the respondent (instructed by Solicitor for Public Prosecutions (Vic))

2.

CATCHWORDS

Baiada Poultry Pty Ltd v The Queen

Criminal law – Appeal – Jury misdirection – Application of "proviso" – Appellant convicted of offence under *Occupational Health and Safety Act* 2004 (Vic) – Trial judge failed to direct jury that prosecution had to prove beyond reasonable doubt particular element of offence in issue – Whether appellate court able to conclude that no substantial miscarriage of justice occurred – Whether judicial "discretion" in applying proviso.

Words and phrases – "proviso", "substantial miscarriage of justice".

Crimes Act 1958 (Vic), s 568(1).
Occupational Health and Safety Act 2004 (Vic), s 21.

1 FRENCH CJ, GUMMOW, HAYNE AND CRENNAN JJ. The appellant was tried in the County Court of Victoria for failing, as an employer, "so far as is reasonably practicable, [to] provide and maintain for employees … a working environment that is safe and without risks to health"[1]. It is now accepted that the trial judge should have, but did not, direct the jury that the prosecution had to prove beyond reasonable doubt that the appellant's engagement of apparently skilled subcontractors to perform the work in the course of which fatal injury was inflicted did not discharge its obligation so far as was reasonably practicable to provide and maintain a safe working environment.

2 On appeal, the Court of Appeal of the Supreme Court of Victoria found[2] that the trial judge had made this error and that there was, accordingly, either "a wrong decision of any question of law or … on any ground … a miscarriage of justice"[3]. By majority, however, the Court of Appeal (Neave JA and Kyrou AJA, Nettle JA dissenting) concluded that "notwithstanding … the point raised in the appeal might be decided in favour of the appellant" the appeal should be dismissed, "no substantial miscarriage of justice [having] actually occurred".

3 The appellant now appeals to this Court and submits that the proviso was not engaged. That submission should be accepted. The appeal should be allowed, the orders of the Court of Appeal set aside and consequential orders made.

The facts

4 The appellant, Baiada Poultry Pty Ltd ("Baiada"), carried on a business of processing broiler chickens at its plant in Laverton North, Victoria. Baiada agreed with growers to supply them with chickens, feed and assistance; the growers agreed to raise the chickens until they were about 32 days old. Baiada agreed with growers that it would round up the chickens and transport them to its plant.

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1 *Occupational Health and Safety Act* 2004 (Vic), s 21(1).

2 *Baiada Poultry Pty Ltd v The Queen* (2011) 203 IR 396.

3 *Crimes Act* 1958 (Vic), s 568(1). Although the Court of Appeal gave its judgment in this matter in February 2011, the appeal provisions in Div 1 of Pt 6.3 of the *Criminal Procedure Act* 2009 (Vic) were not engaged. Those provisions apply only when sentence was passed after 1 January 2010: s 439, Sched 4, cl 10(4). Sentence in this case was passed on 29 May 2009.

5 Baiada engaged independent contractors, known as "chicken catchers", to round up and pack the chickens into crates and it engaged other independent contractors to carry the crates to its plant.

6 Andrea and John Houben were contract growers for Baiada. Baiada arranged for a collection of chickens from the Houbens' farm to take place on the evening of 4 December 2005. Baiada engaged DMP Poultech Pty Ltd ("DMP") to do the chicken catching and Azzopardi Haulage Pty Ltd ("Azzopardi Haulage") to transport the crates of chickens from the farm to the plant. Azzopardi Haulage had to provide a prime mover and a driver; Baiada provided a trailer loaded with empty crates stacked into a series of steel pallets or "modules". DMP had to provide a forklift truck and driver to unload the modules at the farm, provide chicken catchers to catch the chickens and then use the forklift to load the modules of filled crates onto the trailer for Azzopardi Haulage to take back to the plant.

7 All went well at the Houbens' farm until most of the crates had been filled and most of the modules put back onto the trailer. One of the chicken catchers, Jacob Devent, then asked if he could use the forklift to put some remaining modules onto the trailer. Although unlicensed, Mr Devent had been allowed to drive the forklift under the supervision of the supervisor of the chicken catching crew – Aaron Slocombe – and Mr Devent was permitted to drive the forklift to load the remaining modules. By this stage, the principal of Azzopardi Haulage, Mario Azzopardi, who had driven the prime mover and trailer to the farm, was strapping down the load. He asked Mr Devent to shift some of the modules to even up the load. As Mr Devent was doing this, he found a module he was trying to move was stuck and he asked Mr Azzopardi to give him a hand to get it unstuck. As Mr Devent moved the module, another module fell on and killed Mr Azzopardi.

The legislation

8 Part 3 (ss 20-34) of the *Occupational Health and Safety Act* 2004 (Vic) provided for general duties relating to health and safety. Division 2 of Pt 3 (ss 21-23) provided for the main duties of employers. So far as now relevant, s 21 provided:

> "(1) An employer must, so far as is reasonably practicable, provide and maintain for employees of the employer a working environment that is safe and without risks to health.
>
> Penalty: 1800 penalty units for a natural person;

9000 penalty units for a body corporate.

(2) Without limiting sub-section (1), an employer contravenes that sub-section if the employer fails to do any of the following—

(a) provide or maintain plant or systems of work that are, so far as is reasonably practicable, safe and without risks to health;

(b) make arrangements for ensuring, so far as is reasonably practicable, safety and the absence of risks to health in connection with the use, handling, storage or transport of plant or substances;

(c) maintain, so far as is reasonably practicable, each workplace under the employer's management and control in a condition that is safe and without risks to health;

(d) provide, so far as is reasonably practicable, adequate facilities for the welfare of employees at any workplace under the management and control of the employer;

(e) provide such information, instruction, training or supervision to employees of the employer as is necessary to enable those persons to perform their work in a way that is safe and without risks to health."

The provisions of s 21 were to be construed and applied having regard to s 20 of the Act which, as its heading recorded, dealt with "[t]he concept of ensuring health and safety". Section 20 provided:

"(1) To avoid doubt, a duty imposed on a person by this Part or the regulations to ensure, so far as is reasonably practicable, health and safety requires the person—

(a) to eliminate risks to health and safety so far as is reasonably practicable; and

(b) if it is not reasonably practicable to eliminate risks to health and safety, to reduce those risks so far as is reasonably practicable.

(2) To avoid doubt, for the purposes of this Part and the regulations, regard must be had to the following matters in determining what is

(or was at a particular time) reasonably practicable in relation to ensuring health and safety—

(a) the likelihood of the hazard or risk concerned eventuating;

(b) the degree of harm that would result if the hazard or risk eventuated;

(c) what the person concerned knows, or ought reasonably to know, about the hazard or risk and any ways of eliminating or reducing the hazard or risk;

(d) the availability and suitability of ways to eliminate or reduce the hazard or risk;

(e) the cost of eliminating or reducing the hazard or risk."

The provisions of s 21(1) and (2) were also to be construed and applied having regard to sub-s (3) of s 21 which, in effect, provided that reference in sub-ss (1) and (2) to an "employee" included a reference to an independent contractor engaged by an employer and any employees of the independent contractor and that the duties imposed on the employer extended to those persons in relation to matters over which the employer had control. Section 21(4) provided that an offence against sub-s (1) is an indictable offence.

The presentment

9 Baiada was charged with one count of contravening s 21(1) of the *Occupational Health and Safety Act* and one count of contravening s 23(1) of that Act. (Section 23(1) required an employer to ensure that persons other than employees were, so far as was reasonably practicable, not exposed to risks arising from the conduct of the employer's undertaking.) The counts were treated at trial as alternative counts but after the close of the prosecution case the trial judge directed the jury to return a verdict of not guilty to count two on the presentment, which alleged contravention of s 23(1). Count one, to which the jury returned a verdict of guilty, charged that Baiada:

> "at MOOROODUC in the said State on or about the 5th day of December 2005 being an employer did fail to provide and maintain so far as was reasonably practicable for its employees, including Mario Azzopardi, Aaron Slocombe, Jacob Devent, Scott Wilmot, Travis Lowe and Mick Anderson a working environment that was safe and without risks to health in that it failed [to] provide or maintain plant or systems of work that are, so far as is reasonably practicable, safe and without risks to health.

Particulars

In breach of its duty Baiada Poultry Pty Ltd failed to:

(a) Provide a system for separating pedestrians from the forklift operating outside the broiler sheds;

(b) Give any directions or adequate directions to truck drivers to remain in their vehicles during the unloading and loading process at grower farms;

(c) Ensure that the forklift was operated by an employee who had received the training necessary to enable him to:

(i) operate the forklift appropriately and safely
(ii) [e]nsure that other employees were not placed at risk.

(d) Adequately identify and eliminate or control the risks associated with the system of unloading and loading live birds for transport at night; or

(e) Provide a forklift traffic management system which controlled the risk of the forklift injuring pedestrians."

Baiada's case at trial

10 Baiada called no witnesses in its defence. In his final address at trial, counsel for Baiada told the jury that "the particulars [in the presentment], in one way or another, are all concerned, you might think, with forklift control – forklift management and control". And counsel was right to observe that each of the particulars given of the offence directed attention to what was alleged to be a failure by Baiada to control *how* the forklift was to be operated at grower farms (or "broiler sheds"). Thus it was alleged that Baiada should have, but had not, provided an adequate system of work that was to be followed at grower farms or broiler sheds (particulars (a), (b) and (e)), should have, but had not, ensured that the forklift was operated by a properly trained employee (particular (c)) and should have, but had not, identified and eliminated or controlled the risks associated with the system of unloading and loading live birds for transport at night (particular (d)).

11 Baiada made two distinct answers to these allegations. First, Baiada submitted that it did not have any *right* to control how the forklift was used at the Houbens' farm. Baiada said that how the forklift was used was a matter not

within Baiada's control but within the control of DMP, the company that was responsible not only for providing the forklift and a forklift driver but also for using it to stack and unstack the modules on the truck. Acceptance of this submission would have led to the conclusion that the operations on the Houbens' farm were not "matters over which the employer [Baiada] has control"[4] and thus that Baiada's duties did not extend to those operations. Baiada's second submission to the jury was that Baiada "was entitled to rely on competent and experienced sub-contractors in order to carry out the work that they could not do themselves". Counsel for Baiada amplified this second submission in his address to the jury by again adverting to the argument that DMP, not Baiada, had had control over the use and operation of the forklift.

12 When the trial judge asked counsel whether there were exceptions to his charge, counsel for Baiada submitted (among other things) that the trial judge should have directed the jury that Baiada was "entitled to rely on" its subcontractors. The trial judge declined to do so.

13 Subsequently, when counsel for the parties were addressing the trial judge about how a question from the jury should be answered, argument returned to the question of Baiada relying on its subcontractors. (The jury's question concerned what the jury needed "to do regarding the particulars and what needs to be unanimous to make a decision". How the question was answered need not be explored.) In the course of discussion about the jury's question, counsel for Baiada again submitted to the trial judge that Baiada had been entitled to rely on its subcontractors and that "a practicable method" for Baiada to perform its duties under s 21 of the *Occupational Health and Safety Act* may have been to rely on the experience of its subcontractors.

14 Expressing the point as Baiada being "entitled" to rely on its subcontractors or as Baiada's reliance on the experience of subcontractors being a practicable method of performing its duties under s 21 did not directly engage with the words that are used in s 21(1). Section 21(1) obliged an employer "so far as is reasonably practicable" to provide and maintain for employees a safe working environment. No question of "entitlement" was presented by the section. When it was alleged that there was a contravention of s 21(1) the question presented was whether the employer had "so far as [was] reasonably practicable" provided and maintained a safe working environment.

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4 *Occupational Health and Safety Act*, s 21(3)(b).

15 All elements of the statutory description of the duty were important. The words "so far as is reasonably practicable" direct attention to the extent of the duty. The words "reasonably practicable" indicate that the duty does not require an employer to take every *possible* step that could be taken. The steps that are to be taken in performance of the duty are those that are reasonably practicable for the employer to take to achieve the identified end of providing and maintaining a safe working environment. Bare demonstration that a step could have been taken and that, if taken, it might have had some effect on the safety of a working environment does not, without more, demonstrate that an employer has broken the duty imposed by s 21(1). The question remains whether the employer has so far as is reasonably practicable provided and maintained a safe working environment.

16 The true import of Baiada's submissions about reliance on its subcontractors was identified in the course of the argument about how the jury's question should be answered. Trial counsel for the prosecution accepted, correctly, that Baiada's reliance on expert subcontractors could be relevant only to the question of what was reasonably practicable for an employer in the circumstances. And although couched in terms of reliance on or entitlement to rely on subcontractors, it was evident that Baiada sought to say that the prosecution had not proved beyond reasonable doubt that Baiada's exercising a right to control its subcontractors' activities was a step that was reasonably practicable for Baiada to have taken to provide and maintain a safe working environment.

The Court of Appeal

17 All members of the Court of Appeal concluded[5] that the jury had been right to find that, under the arrangements Baiada had with DMP and Azzopardi Haulage, "Baiada had contractual power to give safety directions in relation to the loading activities at Houben Farm". And, as already noted, all members of the Court of Appeal agreed[6] that the jury should have been directed in clear terms that, unless the prosecution had satisfied them beyond reasonable doubt "that Baiada's engagement of DMP and Azzopardi Haulage was *not* sufficient to discharge Baiada's obligation to do what was reasonably practicable to [provide] and maintain a safe work site in the particular respect in issue", they (the jury) were bound to acquit. The Court of Appeal divided, however, on whether,

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5 (2011) 203 IR 396 at 403 [25] per Nettle JA (Neave JA and Kyrou AJA agreeing at 408 [54]).

6 (2011) 203 IR 396 at 406-407 [47], 408 [54].

despite the absence of this direction, no substantial miscarriage of justice had actually occurred.

18 The majority of the Court of Appeal spoke[7] of "[t]he Court's *discretion* to apply the proviso to s 568(1) of the *Crimes Act*" (emphasis added) and spoke[8] of the jury's verdict of guilt as being "a factor which *may* be taken into account in deciding whether a substantial miscarriage of justice has occurred" (emphasis added). But whether or to what extent either of these propositions informed the conclusion reached by their Honours – that the proviso applied – is not clear.

19 Their Honours found[9] that:

> "In the particular circumstances of this case, … it would [not] have been open to the jury on the whole of the evidence to acquit [Baiada] on the basis that it took reasonably practicable steps to protect the health and safety of persons involved in loading the truck at Houben Farm by relying entirely on DMP and Azzopardi Haulage to put in place safety measures."

Rather, their Honours concluded[10], "[i]t was entirely practicable for [Baiada] to require the contractors to put loading and unloading safety measures in place and to check whether those safety measures were being observed from time to time". This conclusion was said[11] to follow from four considerations. First, neither DMP nor Azzopardi Haulage had specialist expertise in loading or unloading the modules which was expertise that Baiada lacked. Second, the risk of death or injury when a forklift was being used to load or unload trucks and the need to take precautions to avoid accidents were obvious. Third, the necessary precautions were commonsense measures well known to Baiada and throughout the industry. Fourth, the cost of issuing safety instructions was minimal compared with the gravity of the risk of harm. It followed, so their Honours held[12], that it was reasonably practicable for Baiada to give, and require

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7 (2011) 203 IR 396 at 408 [57] per Neave JA and Kyrou AJA.

8 (2011) 203 IR 396 at 409 [59].

9 (2011) 203 IR 396 at 409 [60].

10 (2011) 203 IR 396 at 410 [63].

11 (2011) 203 IR 396 at 410 [63].

12 (2011) 203 IR 396 at 410 [63].

compliance with, directions to DMP and Azzopardi Haulage to ensure the safety of all employees engaged in the relevant tasks.

20 By contrast, Nettle JA concluded that, although the prosecution case at trial was strong[13], the proviso was not engaged because "[t]he inadequacy of the judge's direction denied Baiada the benefit of the jury's consideration of one of its two principal defences"[14]. Nettle JA said[15] that, while this was not the same as a significant denial of procedural fairness, it was, in this case, "functionally not dissimilar".

The proviso

21 In *Weiss v The Queen*[16], this Court emphasised that questions about the application of the proviso to the common form criminal appeal statute are, at their root, questions of statutory construction: "It is the words of the statute that ultimately govern, not the many subsequent judicial expositions of that meaning which have sought to express the operation of the proviso … by using other words"[17]. The Court held[18] that "[n]o single universally applicable description of what constitutes 'no *substantial* miscarriage of justice' can be given". The Court also held[19] that, "[l]ikewise, no single universally applicable criterion can be formulated which identifies cases in which it would be proper for an appellate court not to dismiss the appeal, even though persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt".

22 As Nettle JA pointed out in this case[20], the Court in *Weiss* said[21] that "[c]ases where there has been a significant denial of procedural fairness at trial

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13 (2011) 203 IR 396 at 407 [48]-[49].

14 (2011) 203 IR 396 at 407 [51]; see also at 407 [50].

15 (2011) 203 IR 396 at 407 [51].

16 (2005) 224 CLR 300 at 305 [9], 312-313 [31]-[33]; [2005] HCA 81.

17 (2005) 224 CLR 300 at 305 [9].

18 (2005) 224 CLR 300 at 317 [44].

19 (2005) 224 CLR 300 at 317 [45].

20 (2011) 203 IR 396 at 407 [51].

may provide examples of cases" of a kind where, though persuaded that the evidence properly admitted at trial proved the accused's guilt beyond reasonable doubt, an appellate court should nonetheless hold that the proviso is not engaged. And circumstances of the kind considered by this Court in *AK v Western Australia*[22] provide a further example of such a case. In *AK*, statute required that a criminal trial by judge alone yield a reasoned decision but no reasons were given for the determination of the central issue tried so that it could not be denied that there was a substantial miscarriage of justice.

23 Two points of immediate relevance follow from the Court's decision in *Weiss* that no single universally applicable criterion can be stated to identify either when the proviso does apply or when it does not apply. First, contrary to the respondent's submissions, it is neither possible nor useful to attempt to argue about the application of the proviso by reference to some supposed category of "fundamental defects" in a trial. To do so distracts attention from the necessary task of statutory construction. The question presented by the proviso is whether there has been a "substantial miscarriage of justice".

24 Second, recognising the need to focus upon whether there has been a substantial miscarriage of justice both reflects and gives proper effect to the text and structure of the proviso. It is necessary to explain why that is so.

25 It is to be recalled, as was pointed out in *Weiss*[23], that the proviso to the common form criminal appeal statute is cast in permissive terms: "the Court of Appeal *may*, notwithstanding …, dismiss the appeal if it considers …". That is, the proviso gives the Court of Appeal power to dismiss the appeal *if* the stated condition ("it considers that no substantial miscarriage of justice has actually occurred") is satisfied. No doubt a judgment must be made in deciding whether there has been no *substantial* miscarriage of justice. But if that condition is met, the power must then be exercised[24]. That is, if the Court of Appeal considers that

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21 (2005) 224 CLR 300 at 317 [45].

22 (2008) 232 CLR 438 at 456-457 [56]-[59], 482 [109]-[110]; [2008] HCA 8.

23 (2005) 224 CLR 300 at 317 [44].

24 See, for example, *Finance Facilities Pty Ltd v Federal Commissioner of Taxation* (1971) 127 CLR 106 at 134-135 per Windeyer J; [1971] HCA 12; *Hogan v Australian Crime Commission* (2010) 240 CLR 651 at 664 [32]-[33] per French CJ, Gummow, Hayne, Heydon and Kiefel JJ; [2010] HCA 21; *Hogan v Hinch* (2011)

(Footnote continues on next page)

no substantial miscarriage of justice has actually occurred, the appeal *must* be dismissed in exercise of the power the proviso confers on the Court of Appeal. It is not to be supposed that, if an appellate court concluded that there had been no substantial miscarriage of justice, the appellate court could nevertheless allow the appeal and direct that a new trial be had.

26 So understood it is evident that it is wrong to speak of the proviso as conferring some "discretion" on the Court of Appeal. The proviso directs attention to whether the error or errors identified as having occurred at trial (which constitute the point or points raised in the appeal that might be decided in favour of the appellant) are not such as to have occasioned any substantial miscarriage of justice. Describing that decision as "discretionary" is at least distracting, if it does not invite error. It is distracting because the description requires consideration of which of the several different ways in which the concept of "discretion" can be used[25] is intended. It invites error if it suggests that the proviso need not be applied even if no substantial miscarriage of justice has actually occurred.

27 As was pointed out in *Weiss*[26], an appellate court must undertake the task of determining whether no substantial miscarriage of justice has actually occurred in the same way as it would decide whether the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence although, of course, the inquiries are distinct. That task must[27] be undertaken on the whole of the record of the trial including the fact that the jury returned a guilty verdict. But two further points must be made about the determination of whether no substantial miscarriage of justice has actually occurred.

28 First, the significance to be given to the fact that the jury has returned a guilty verdict must be assessed paying proper regard to what were the issues that the jury were directed to determine in order to arrive at a verdict of guilt. In the present case, it is of the first importance to recognise that the jury were not

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243 CLR 506 at 548 [68] per Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ; [2011] HCA 4.

25 See *Norbis v Norbis* (1986) 161 CLR 513 at 518; [1986] HCA 17; *Dwyer v Calco Timbers Pty Ltd* (2008) 234 CLR 124 at 138-139 [37]-[40]; [2008] HCA 13.

26 (2005) 224 CLR 300 at 316 [41].

27 (2005) 224 CLR 300 at 317 [43].

directed to consider whether the prosecution had established beyond reasonable doubt that Baiada's engagement of DMP and Azzopardi Haulage was not sufficient to discharge Baiada's obligation so far as was reasonably practicable to provide and maintain a safe working environment at the Houbens' farm. It follows that the verdict returned by the jury said nothing about that question.

29 The second point to make about determining the application of the proviso is that the Court held, in *Weiss*[28], that the proviso *cannot* be engaged "unless the appellate court is persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt of the offence on which the jury returned its verdict of guilty". That is a negative proposition. It states a necessary but not sufficient condition for applying the proviso. As this Court's decision in *AK v Western Australia*[29] shows, demonstration that a chain of reasoning can be articulated that would require the verdict reached at trial does not always permit, let alone require, the conclusion that no substantial miscarriage of justice actually occurred. Nettle JA recognised[30] this to be so; the majority in the Court of Appeal focused only upon whether Baiada was proved beyond reasonable doubt to be guilty of the offence charged[31].

Did the proviso apply in this case?

30 As has been explained, consideration of the application of the proviso begins from identifying the error that was made at trial. In this Court, as in the Court of Appeal, the error was sometimes described as a failure to put one of Baiada's two "defences" to the jury. And casting the point as being Baiada's "entitlement to rely" on independent contractors accords with the notion that the proposition was advanced by Baiada as a defence to the charge. But the point which Baiada made was in substance a denial that a necessary element of the offence had been established. That is, Baiada's submission was that the prosecution had not established beyond reasonable doubt that it had failed "so far as [was] reasonably practicable" to provide and maintain a safe working environment. And the direction which the Court of Appeal held should have (but had not) been given was that the jury had to be satisfied of that matter beyond reasonable doubt.

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28 (2005) 224 CLR 300 at 317 [44].

29 (2008) 232 CLR 438 at 457 [58].

30 (2011) 203 IR 396 at 407 [50]-[51].

31 (2011) 203 IR 396 at 410 [64].

31 It may well be right to observe that the proviso could seldom be applied in a case where, as here, the jury were not sufficiently directed of the need to be satisfied to the requisite standard of an element of the offence being considered. And it may also be right to observe that the proviso could seldom be applied if "[t]he inadequacy of the judge's direction denied Baiada the benefit of the jury's consideration of one of its two principal defences"[32]. But it is important to emphasise the fundamental point made in *Weiss*: that the imposition of some taxonomy for the application of the proviso according to expressions – even judicially determined expressions – different from the relevant statutory expression invites error.

32 For the reasons that have been given, the better view is that the jury were not sufficiently directed about the need to be satisfied about an element of the *offence* rather than about a matter of *defence*. A direction of the kind that was found to be necessary was required because Baiada had put the relevant element of the offence in issue. Baiada had not only submitted to the jury that this element of the offence had not been established; it had also submitted, in final address, that, even if Baiada had had the right to control what its subcontractors did at the Houbens' farm, DMP was in charge of the use of the forklift and it had not been proved beyond reasonable doubt that it was reasonably practicable for Baiada to have taken steps that would result in DMP going about its task of operating the forklift in a way that provided and maintained a safe working environment.

33 As the reasons of the majority in the Court of Appeal reveal by their reference[33] to Baiada *checking* compliance with directions it gave to DMP and Azzopardi Haulage, the question presented by the statutory duty "so far as is reasonably practicable" to provide and maintain a safe working environment could not be determined by reference only to Baiada having a legal right to issue instructions to its subcontractors. Showing that Baiada had the legal right to issue instructions showed only that it was *possible* for Baiada to take that step. It did not show that this was a step that was reasonably practicable to achieve the relevant result of providing and maintaining a safe working environment. That question required consideration not only of what steps Baiada could have taken to secure compliance but also, and critically, whether Baiada's obligation "so far as is reasonably practicable" to provide and maintain a safe working environment

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32 (2011) 203 IR 396 at 407 [51] per Nettle JA.

33 (2011) 203 IR 396 at 410 [63].

obliged it: (a) to give safety instructions to its (apparently skilled and experienced) subcontractors; (b) to check whether its instructions were followed; (c) to take some step to require compliance with its instructions; or (d) to do some combination of these things or even something altogether different. These were questions which the jury would have had to decide in light of all of the evidence that had been given at trial about how the work of catching, caging, loading and transporting the chickens was done.

34 As earlier explained, the jury's guilty verdict told the Court of Appeal nothing about the issue of whether Baiada was bound to give directions or give directions and take steps to procure compliance with them. The jury had not been required to consider either issue. Reference by the majority in the Court of Appeal to the jury's verdict was therefore irrelevant to the majority's consideration of whether the evidence at trial showed beyond reasonable doubt that it *was* reasonably practicable for Baiada to have given directions to DMP about how to operate the forklift and to have checked that the instructions were observed.

35 The Court of Appeal could conclude (as the majority did) that it was proved beyond reasonable doubt that it was reasonably practicable for Baiada to take these steps only if it was not open to a jury to conclude to the contrary. If it was open to a jury to reach a contrary conclusion, the point was not established beyond reasonable doubt. In particular, if it was open to a jury to conclude that it had not been proved beyond reasonable doubt that it was reasonably practicable for Baiada to give its subcontractors instructions about how they were to perform their work and to check that the instructions were observed, it was open to a jury to acquit.

36 All members of the Court of Appeal agreed that the jury should have been instructed to consider the issue of reasonable practicability. And a direction of that kind was necessary *only* if the issue was a live issue at the trial – an issue which it was necessary for the jury to consider before returning its verdict[34]. The conclusion reached by the majority in the Court of Appeal – that the evidence established beyond reasonable doubt that Baiada's *effectively* exercising its right to control its subcontractors was "reasonably practicable" – was inconsistent with the conclusion that the issue whether the prosecution had established this element beyond reasonable doubt was one which should have been put to the jury for its decision. No doubt the Court of Appeal could decide whether Baiada had the right to give instructions to its subcontractors. It may also be accepted that the

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34 *Alford v Magee* (1952) 85 CLR 437 at 466; [1952] HCA 3.

evidence led at trial *permitted* the jury to conclude beyond reasonable doubt that it was reasonably practicable for Baiada to take steps to ensure compliance with instructions of that kind. But the evidence led at trial did not *compel* that conclusion.

37 As has been noted, the majority in the Court of Appeal identified four considerations as supporting their conclusion[35] that "[i]t was entirely practicable for [Baiada] to require the contractors to put loading and unloading safety measures in place and to check whether those safety measures were being observed from time to time". It may be doubted that one of those considerations (that the subcontractors had no specialist knowledge that Baiada lacked) bore upon whether it was practicable for Baiada to give instructions to its subcontractors or to check whether its instructions were being observed. And no consideration was given to how or at what cost the process of "checking" compliance with safety instructions could or would be undertaken or to the likelihood of the risk eventuating.

38 The other matters to which the majority pointed in their reasons went, as they said, to whether it was practicable for Baiada to take the steps identified. But for the reasons given earlier, demonstration that some step *could* have been taken does not, without more, demonstrate that to fail to take that step was a breach of the obligation so far as was reasonably practicable to provide and maintain a safe working environment. The circumstances to which the majority pointed did not *require* the conclusion that not taking the identified steps was a breach of Baiada's duty.

39 It was, therefore, not open to the Court of Appeal to conclude from the record of the trial that the charge laid against Baiada was proved beyond reasonable doubt. Because the majority in the Court of Appeal were wrong to reach the conclusion that the evidence led at trial proved the guilt of Baiada beyond reasonable doubt, the proviso could not be engaged. The Court of Appeal could not be satisfied that no substantial miscarriage of justice had actually occurred.

Conclusion and orders

40 For these reasons the appeal to this Court should be allowed. The order of the Court of Appeal of the Supreme Court of Victoria made on 18 February 2011 should be set aside. In its place there should be orders that leave to appeal to the

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35 (2011) 203 IR 396 at 410 [63].

Court of Appeal against conviction is granted, the appeal is allowed, the conviction and sentence are quashed and a new trial be had.

41 HEYDON J. This case concerns two important topics. One is workplace safety. The other is justice in criminal procedure.

42 The appellant processed chickens at its plant. It made arrangements to raise, catch, crate, load and deliver them to that plant. Mr and Mrs Houben raised chickens for the appellant. The appellant arranged to collect some chickens from the Houben farm on 4 December 2005. The appellant provided a trailer containing empty crates into which the chickens were to be placed. The appellant also engaged two subcontractors. One was DMP Poultech Pty Ltd. It was to provide a forklift and driver to unload the empty crates. It was also to provide chicken catchers who were to catch the chickens on the farm, fill the crates, and load the full crates onto the trailer. The other subcontractor was Azzopardi Haulage Pty Ltd. It was to provide a driver and a prime mover to convey the loaded trailer from the Houben farm to the appellant's plant. One of the chicken catchers, who was not licensed to drive a forklift, began to do so while the trailer was being loaded. In the course of this activity Mr Azzopardi, the principal of Azzopardi Haulage Pty Ltd, was killed.

The proceedings

43 The appellant was convicted on one count of failing to promote and maintain for its employees, so far as was reasonably practicable, a working environment that was safe and without risks to health. That was a contravention of s 21(1) of the *Occupational Health and Safety Act* 2004 (Vic) ("the Act")[36]. Section 21(3) of the Act provided that "employee" included an independent contractor engaged by an employer and any employees of the independent contractor. And s 21(3)(b) of the Act provided that:

> "the duties of an employer under [s 21(1) and (2)] extend to an independent contractor engaged by the employer, and any employees of the independent contractor, in relation to matters over which the employer has control or would have control if not for any agreement purporting to limit or remove that control."

44 The appellant applied for leave to appeal to the Court of Appeal of the Supreme Court of Victoria. That Court held that the trial judge had erred in failing to direct the jury that they had to be satisfied that the appellant's engagement of two subcontractors was not sufficient to discharge the appellant's obligation under s 21(1). However, a majority of the Court of Appeal applied the

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36 See above at [8].

proviso to s 568(1) of the *Crimes Act* 1958 (Vic)[37]. That is, although it decided the jury direction point in favour of the appellant, it dismissed the application for leave to appeal because it considered "that no substantial miscarriage of justice [had] actually occurred".

The Notice of Appeal

45 The appellant has appealed against the Court of Appeal's order. It advanced what were in substance two grounds of appeal. One is that the Court of Appeal erred in holding that it had a "discretion" as to whether to apply the proviso[38]. The other is that it erred in applying the proviso where, by virtue of the trial judge's directions, the appellant had been denied the jury's consideration of "one of its principal defences."

The "discretion" complaint

46 The word "discretion" is used in many senses in the law. It has been suggested that "the best disposition to be made of a word that can be used in so many senses, some of them at least utterly inconsistent with others, is to drop it from the vocabulary of the law."[39] This is likely to be a vain hope. A more practical course is to use the word as little as possible except where its meaning is made plain. However, the use of the word by the Court of Appeal majority in this case does not justify allowing the appeal.

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37 Section 568(1) provided:

> "(1) The Court of Appeal on any such appeal against conviction shall allow the appeal if it thinks that the verdict of the jury should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence or that the judgment of the court before which the appellant was convicted should be set aside on the ground of a wrong decision of any question of law or that on any ground there was a miscarriage of justice and in any other case shall dismiss the appeal:
>
> Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred."

38 *Baiada Poultry Pty Ltd v The Queen* (2011) 203 IR 396 at 408 [57] per Neave JA and Kyrou AJA.

39 Isaacs, "The Limits of Judicial Discretion", (1923) 32 *Yale Law Journal* 339 at 340.

47 Section 568(1) provided that the court "shall" allow the appeal if a listed ground for doing so is made out, but "may" dismiss the appeal if it considers that "no substantial miscarriage of justice has actually occurred." That latter standard is somewhat indeterminate. It turns on matters of judgment and degree. In that sense s 568(1) creates a discretion. The preferable view of s 568(1) is that once that standard is met, "may" means "must". Section 568(1) is within the following words of Windeyer J: "the particular context of words and circumstances make ['may'] not only an empowering word but indicate circumstances in which the power is to be exercised – so that in those events the 'may' becomes a 'must'."[40] It would certainly be extraordinary to construe s 568(1) as providing that even if a court found a substantial miscarriage of justice, it could nonetheless dismiss the appeal and leave the substantial miscarriage of justice unaddressed. Hence there can be no doubt that once a court has found a substantial miscarriage of justice, the appeal must be allowed. On the other hand, once a court has found that there is no substantial miscarriage of justice, then, subject to one possible qualification, the appeal must be dismissed. Understood in this sense, the proviso has been described as an "important discretion"[41]. Indeed, understood in this sense, members of this Court have not infrequently used the language of discretion to describe the proviso[42]. If the Court of Appeal majority was using the term "discretion" in that way, it was correct.

48 The possible qualification just referred to is that, on one view, there is not necessarily a duty to dismiss the appeal once it has been concluded that there was no substantial miscarriage of justice. "There are errors, the nature of which have never been defined, which the court will not condone irrespective of whether the accused was in fact prejudiced."[43] Another view is that the qualification is unnecessary. On that view these uncondonable errors are caught up in the idea of

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40 *Finance Facilities Pty Ltd v Federal Commissioner of Taxation* (1971) 127 CLR 106 at 134 per Windeyer J; [1971] HCA 12.

41 Pattenden, *Judicial Discretion and Criminal Litigation*, 2nd ed (1990) at 361.

42 *Wilde v The Queen* (1988) 164 CLR 365 at 383-384 per Gaudron J; [1988] HCA 6; *Glennon v The Queen* (1994) 179 CLR 1 at 4 per Mason CJ, Brennan and Toohey JJ; [1994] HCA 7; *Green v The Queen* (1997) 191 CLR 334 at 397 per Kirby J; [1997] HCA 50; *KBT v The Queen* (1997) 191 CLR 417 at 435 per Kirby J; [1997] HCA 54; *Gipp v The Queen* (1998) 194 CLR 106 at 147 per Kirby J; [1998] HCA 21; *Festa v The Queen* (2001) 208 CLR 593 at 653 [199] per Kirby J; [2001] HCA 72; *Conway v The Queen* (2002) 209 CLR 203 at 232 [79] per Kirby J; [2002] HCA 2; *Libke v The Queen* (2007) 230 CLR 559 at 581 [49] per Kirby and Callinan JJ; [2007] HCA 30.

43 Pattenden, *Judicial Discretion and Criminal Litigation*, 2nd ed (1990) at 363. She had in mind cases like *Wilde v The Queen* (1988) 164 CLR 365.

a "substantial miscarriage of justice". This debate may be placed to one side in this appeal.

49 The Court of Appeal majority may have been using the word "discretion" in another way. It may have meant that even if it concluded that there had been no substantial miscarriage of justice it retained a relatively unfettered power not to dismiss the appeal, and that even if it concluded that there had been a substantial miscarriage of justice it retained a relatively unfettered power to dismiss the appeal. On this construction, the only fetters on the power would be those created by what was said in *House v The King*[44].

50 It would be strange to construe s 568(1) as conferring a "discretion" in that sense. It is extremely unlikely that the Court of Appeal was doing so. The parties agreed that it was not.

Denial to the jury of a chance to consider a principal "defence"

51 Section 21(2)(c)-(d) and (3)(b) of the Act specifically referred to the employer's "control". No employee of the appellant was actually present while the operations leading to Mr Azzopardi's death took place. Hence, arguably, the appellant was not in actual control. However, the prosecution case appeared to rest on the theory that the appellant had a right to control the operations of the forklift. That is how the Court of Appeal perceived the prosecution case. The appellant did not deny that that case, if made out, took the prosecution some distance towards conviction.

52 *Two "defences"*. The appellant argued that it had two "defences".

53 One "defence" was that Mr Azzopardi's death arose out of "forklift traffic management outside broiler sheds at grower farms". The appellant submitted that it did not have a right to control that operation.

54 The other "defence" was that in seeking to provide a safe system of work, the appellant was "entitled to rely on the expertise of subcontractors, being the chicken catchers, DMP, whose direct employee and forklift was [sic] involved in the relevant incident." The appellant's position was that its employment of expert and experienced contractors met the requirement of s 21(1) and (2) to go as "far as is reasonably practicable".

55 *The language of "defences"*. The parties persistently, though not universally, spoke of the appellant's "defences". However, as Nettle JA recognised in his dissenting judgment, this terminology is inappropriate. These

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44 (1936) 55 CLR 499 at 504-505; [1936] HCA 40.

"defences" were not matters on which the appellant as the accused bore any burden of proof, whether legal (ie persuasive) or evidential. They were not matters which the appellant as the accused was required to establish in order to avoid the prosecution's prima facie entitlement to a conviction. Rather, they were denials of essential ingredients in the prosecution's case. They were matters on which the prosecution bore a legal (ie persuasive) burden of proof beyond reasonable doubt[45]. Thus, in relation to the first "defence", it was for the prosecution to establish beyond reasonable doubt that the appellant did have control, or a right to control, over forklift traffic management outside broiler sheds at grower farms. And, in relation to the second "defence", it was for the prosecution to establish beyond reasonable doubt that there were reasonably practicable measures open to the appellant additional to its engagement of subcontractors.

56 *A "peripheral matter"?* In this Court, counsel for the respondent submitted that the employment of expert and experienced subcontractors "was only raised as a peripheral matter to the control issue." If sound, on one approach[46], the submission would have been relevant to whether the proviso should have been applied. Arguably it would have suggested that the trial was not *fundamentally* flawed.

57 The submission relied on counsel for the appellant's statement, in his closing address to the jury, that "the issue in this case is very simple … a question of control." But he then widened the issue. He described the possible roles of the Houbens, DMP Poultech Pty Ltd and Mr Azzopardi in relation to managing the forklift. He then said that the appellant "was entitled to rely on competent and experienced subcontractors in order to carry out the work that they could not do themselves." He repeated that submission a little later.

58 After the trial judge's summing up concluded, counsel for the appellant took certain exceptions. One was that the trial judge had not told the jury that the appellant "was entitled to rely on expert and experienced independent contractors." He requested that direction. The trial judge declined to give it.

59 At a later stage counsel for the appellant reminded the trial judge of the direction he had requested about the appellant's entitlement to rely on the "experience and expertise of [its] independent contractors." The following dialogue then took place:

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45 See the analysis for civil cases advanced by Walsh JA in *Currie v Dempsey* (1967) 69 SR (NSW) 116 at 125.

46 See above at [48]. See also *Weiss v The Queen* (2005) 224 CLR 300 at 317 [44]-[46]; [2005] HCA 81.

> "HIS HONOUR: Is that correct?
>
> [COUNSEL]: In our submission, yes.
>
> HIS HONOUR: Don't the authorities suggest, if they are said to have control that is control over the independent –
>
> [COUNSEL]: Yes, but you can exercise or perform your duties pursuant to s 21, a [practicable] method may be by relying on the experience of their independent contractors."

Counsel for the appellant then sat down.

60 Counsel for the prosecution said that the only issue in the case was the right to control. He said that the question of expert contractors had nothing to do with that issue. He said that it had not been a matter of contest. After counsel for the appellant correctly said that he had addressed the jury on it, counsel for each side reiterated their respective positions. Counsel for the appellant concluded thus:

> "If [the jurors] fail to be satisfied beyond reasonable doubt that there was the right to control, then that's the end of the case for the prosecution – simple. If, however, they found beyond reasonable doubt that there was a right to control and we say that it is not open for them to do so, but assuming that they did, then the next question is whether there was then a failure to provide plant or systems of work that were, so far as reasonably practicable safe and without risk to health. Because the control is an antecedent step to deciding whether or not there was a failure to provide plants systems at work that were safe and without risk to health. It is then that they have to look at whether or not Baiada was entitled to rely on the expertise of its independent contractors. The control is central, no doubt about it, that it's an antecedent question. We have run the case on a basis the central question is one of control, no doubt about that, because in our view of the world which has not held sway thus far, although it might with the jury one hopes, is that there was no evidence upon which that conclusion can be reached. That does not mean that that is the end of the contest. We specifically addressed on their capacity, their ability, to rely on their independent contractors."

61 In these circumstances, it cannot be said that the second "defence" was only "raised as a peripheral matter to the control issue". The respondent's submission to that effect must be rejected.

62 *Was there a direction?* Did the trial judge fail to direct the jury about the second "defence"? Yes, unless what the trial judge said in answering a question from the jury on another matter was sufficient. He said:

> "this case is really about the issue of whether [the appellant] had control over the independent contractor, and particularly Poultech. The Crown says it did, real or actual, the defence says there is no evidence that it did. *And that in terms of whether it was reasonably practicable to do so it relied upon an expert independent contractor*. If you are not satisfied of the Crown case against the accused company then that's the end of it. If you were so satisfied then you might consider whether again it was reasonably practicable, or *that was satisfied by the use of an expert independent contractor in terms of its agreement to pick up chickens*." (emphasis added)

Later he said that defence counsel "*submitted* again that they were, that is *Baiada were entitled to rely upon independent expert contractors to do that matter*." (emphasis added) The Court of Appeal found that this direction was inadequate.

63 The respondent submitted to this Court that "the element was not altogether ignored by the learned trial judge." However, the appellant submitted that the emphasised words were not a direction. They were only a repetition of the appellant's argument. Actually, they were not even a repetition. They proffered to the jury a label or slogan under which a proper direction might have been given. But they did not amount by themselves to an adequate direction. As Nettle JA said, the trial judge, in telling the jury that defence counsel's submission was a matter which they might consider, "in effect implied that the jury were at liberty to ignore it at their option."[47] Further, there is an issue of construction about the meaning of the words "so far as reasonably practicable". Must the employer provide the safest working environment that is reasonably practicable? Or is it sufficient for the employer to provide one among a range of reasonably practicable safe working environments? The better view is the latter. However, the trial judge did not explain what the meaning was.

64 The respondent also submitted: "The trial judge redirected the jury at the request of the appellant's trial counsel along the lines sought by defence counsel, without further exception being taken to the redirection." The first half of this sentence is not correct. The second half is irrelevant. In the circumstances of this case, it was not necessary for defence counsel, having taken proper exception, to have made a further complaint when the exception was explicitly rejected.

65 In some circumstances, the employment of independent contractors may be the only reasonably practicable way of ensuring and maintaining a safe working environment. Assume that two householders want an electrician to lay

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47 *Baiada Poultry Pty Ltd v The Queen* (2011) 203 IR 396 at 406 [46].

an electrical wire underground going into their house. Assume that they also want a plumber to repair pipes near that wire. Assume that the householders are wholly inexperienced in electrical and plumbing work. Assume that the electrician and the plumber are expert and experienced in their fields. Assume that they know where the pipes are in relation to the wire. Any attempt by the householders to deliver a speech about safety would be likely to prompt aggressive responses from the contractors. The criteria of reason suggest that it would be more practicable for the householders to rely on the contractors to ensure safety. To hold otherwise would demonstrate an extreme harshness in the legislation. Very often those who engage independent contractors know much less about safety than the independent contractors do.

66 No doubt the appellant was in a different position from the above householders in several respects. It had specialist skills in processing chickens. But these skills may not have given it skills superior to those of its independent contractors in the safety aspects of catching, loading and transporting them. In the present case, it was for the prosecution to prove that whatever measures it alleged the appellant should have undertaken would have been reasonably practicable. Depending on the construction of s 21, it was for the prosecution to prove that those measures were more practicable than relying on the two subcontractors the appellant engaged. But a jury direction on the topic was required.

67 *The significance of the jury verdict.* The appellant argued that in considering the proviso the majority erred in taking into account the fact that the jury convicted the appellant. On occasion it is relevant to do so. But the fact of a conviction may have no significance where the error on which the appeal is based is that the jury was not properly directed about the elements of the charge as they stood in the light of the evidence and the appellant's arguments. In some circumstances, including the present, weight is not to be attached to the verdict of a jury which received no adequate direction on a crucial issue. The respondent accepted that the Court of Appeal majority said that a jury verdict of guilty "may be taken into account in deciding whether a substantial miscarriage of justice has occurred."[48] But the respondent submitted that it could not be inferred that their Honours had placed any weight on the jury's verdict. The respondent also submitted that their Honours formed their own view of the evidence independently of the jury verdict. However, mentioning the possibility of taking the jury verdict into account suggests that it was taken into account.

68 *"Further elucidation" of Weiss v The Queen.* The appellant identified four issues as among those presented by the appeal. One was whether aspects of

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48 *Baiada Poultry Pty Ltd v The Queen* (2011) 203 IR 396 at 409 [59].

Weiss v The Queen[49] required "further elucidation". The invitation further to elucidate aspects of that case was not precisely framed. Nor was it supported by submissions from either side directed specifically to the question of what needed elucidation, and along what lines. The invitation must be rejected because this is not a case in which it is necessary to accept it.

69 *Applying the proviso.* The respondent submitted that there was no evidence upon which the jury, even if it had been properly instructed, could have drawn any conclusion other than guilt. This may exemplify the fallacy of treating the appellant's point as a "defence". The question was rather whether the respondent had excluded any reasonable possibility that the engagement of independent contractors was a reasonably practical means of providing a working environment that was safe and without risks to health.

70 The respondent also submitted that in the context of the way the case was run, once the jury found that the appellant had a right to control its subcontractors, a duty lay on the appellant "to exercise that right if it was to meet the standard of so far as is reasonably practicable". In that regard the respondent supported the following statement of the Court of Appeal majority[50]:

> "It was entirely practicable for the [appellant] to require the contractors to put loading and unloading safety measures in place and to check whether those safety measures were being observed from time to time."

Of course, even if these things were practicable, it does not follow that s 21(1) required them. On the respondent's case reliance on the independent contractors was incapable in law of complying with s 21(1) of the Act. That view is an extreme one. It is difficult to accept in the particular circumstances of these proceedings. One of those circumstances was that DMP Poultech Pty Ltd, for example, had clear safety procedures in place. Another was that both contractors had specialist expertise in loading crates full of chickens onto trailers. The appellant had safety procedures at its own plant for its own employees. It does not follow that s 21(1) called for them to require its contractors to put them in place for their own employees or to check whether they were being observed.

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49 (2005) 224 CLR 300.

50 *Baiada Poultry Pty Ltd v The Queen* (2011) 203 IR 396 at 410 [63].

71 In *Weiss v The Queen* the Court said[51]:

> "It cannot be said that no substantial miscarriage of justice has actually occurred unless the appellate court is persuaded that the evidence properly admitted at trial proved, beyond reasonable doubt, the accused's guilt of the offence on which the jury returned its verdict of guilty."

That depends on the true construction of the statutory provision creating the offence[52]. When that construction is taken into account, the evidence did not prove guilt beyond reasonable doubt.

Orders

72 The appeal should be allowed. Consequential orders should be made, including an order for a new trial.

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51 (2005) 224 CLR 300 at 317 [44] per Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ.

52 See above at [63].